

MAY 29 1944

CHARLES ELMORE DROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1043

GALLAGHER'S STEAK HOUSE, INC.,
Petitioner,

v.

CHESTER C. BOWLES, Administrator, Office of Price
Administration; TALBOT SMITH, Hearing Adminis-
trator, Office of Price Administration; HARRY B.
CHAMBERS, Hearing Commissioner, Office of Price
Administration, and MITCHELL JELLINE, Chief
Enforcement Attorney, Office of Price Administration,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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v.

CHESTER C. BOWLES, Administrator, Office of Price Administration; TALBOT SMITH, Hearing Administrator, Office of Price Administration; HARRY B. CHAMBERS, Hearing Commissioner, Office of Price Administration, and MITCHELL JELLINE, Chief Enforcement Attorney, Office of Price Administration,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Gallagher's Steak House, Inc., a corporation, respectfully presents this petition for Writ of Certiorari to review the mandate of the United States Circuit Court of Appeals for the Second Circuit rendered May 19, 1944, which affirmed an order of the District Court of the United States for the Southern District of New York in favor of respondents and against petitioner. (186-192*)

*Numbers refer to folios in the Transcript of Record.

Summary and Short Statement of Matter Involved.

Petitioner filed a complaint in the District Court of the United States for the Southern District of New York seeking to enjoin the enforcement of a suspension order issued by the Office of Price Administration (hereinafter referred to as OPA). An application was made for a temporary restraining order and for a preliminary injunction. The temporary restraining order (68) was issued, but the application for a preliminary injunction was denied, the temporary restraining order, however, being continued pending appeal (186-192). The order denying the application for the preliminary injunction was affirmed by the United States Circuit Court of Appeals for the Second Circuit, but with consent of respondents execution of the mandate of the Circuit Court has been stayed by order pending the instant application for Writ of Certiorari.

Petitioner operates a restaurant in New York City, with 102 employees, catering to about 500,000 patrons annually, and doing an annual business of more than \$1,000,000. It has conducted its business since May, 1933 under a valuable lease, which expires not until May, 1947 and which contains a ten-year renewal option. Petitioner's additional investment in its business amounts to about \$250,000. It specializes in steaks and is nationally known as a Steak House. *It is therefore not affected by the recent directive of respondent Bowles terminating rationing of meats because steaks and beef roasts are excepted from said directive.*

Pursuant to the regulations of respondents, petitioner filed its initial application for ration points for the use of meats, fats, and oils based upon services of food during the month of December, 1942, the base and it was awarded points sufficient to cover only 8.1% of its December business (73). Through a mistake and a misunderstanding of OPA's complex regulations, petitioner did not

ask in its original application for points for 9,000 food services to employees and 37,476 beverage services to customers to whom was served solely a beverage as distinguished from foods. On an amended application, petitioner was allowed 9,000 employees' service points, but its request for 37,476 points resulted in an allowance of only 7500 points. The full claim for beverage services should have been allowed because under OPA's own interpretation of Ration Order No. 5 (183) petitioner was entitled to have points for the number of persons "served only an alcoholic or non-alcoholic beverage" (183).

Petitioner appealed to the Washington OPA from the allowance of only 7500 beverage points but the determination of the Local War Price & Rationing Board was affirmed on December 7, 1943, the date when petitioner's original application for a temporary injunction was argued in the District Court (89).

While petitioner's appeal from the allowance of the Local War Price & Rationing Board was pending and in reasonable expectation and anticipation of affirmative, fair, and equitable relief from the arbitrary determination of said Rationing Board, petitioner continued its purchases and fell into arrears. In the expectation that it would ultimately receive the same treatment that other restaurants had received (172) and that it would have OPA'S own interpretation applied reasonably and equitably in its favor, petitioner purchased meats without points therefor on the basis of a 37,476 beverage points which should in petitioner's opinion have been allowed and accordingly fell into arrears to the extent of over 200,000 points, having secured meats, etc. on credit between the date of the original issue of ration points April 1, 1943 and June 26, 1943 (75).

On June 26, 1943, OPA filed charges against petitioner based upon the alleged arrearages. As a result of a hear-

ing that took place on September 17, 1943, a suspension order was issued (Exhibit B, Bill of Complaint (42-48).*

It was conceded at the hearing in the District Court that this suspension order would have the effect of putting petitioner out of business (170) because General Ration Order No. 5 in Article 7, Section 7.3 (Issued 2/18/43 effective 2/20/43) FR. 2/19/43)** thereof sets up the means whereby allotments of points are to be granted to restaurants after the initial period. For periods after the initial period (April 1, 1943) it is incumbent upon any restaurant to compare the volume of its business during December, 1942, with the volume during the first two of the three calendar months *preceding a new allotment period*. If the number of persons served during such two month

* The suspension order herein was issued according to Procedural Regulation No. 4, (issued February 13, 1943, effective February 16, 1943, FR March 27, 1943), which set up the procedure for hearing before officials of OPA. The order itself was issued pursuant to General Ration Order No. 8 (issued March 25, 1943, effective April 15, 1943, FR March 27, 1943) providing that anyone who violates a ration order may be prohibited from receiving or from selling, using or otherwise disposing of any rationed commodity. Ration Order No. 16 involving meats, fats and oils (issued March 20, 1943, effective March 29, 1943, 8 FR 6446) provides in Article XXIII for the issuance of a suspension order for violation of said ration order.

All of the aforesaid orders and regulations allegedly stem from Title III of the Second War Powers Act, Section 2(a)2 (56 Stat. 176, 50 U.S.C.A. App. 631 etc.).

The pertinent provisions of the suspension order under review are:

"Therefore, It Is ORDERED, that

(a) Respondent, as an * * * institutional user * * * during this suspension

1. Shall not acquire or receive, directly or indirectly, rationed commodities as defined in Ration Order No. 16.

2. Shall keep posted, plainly visible to the public, at its place of business any notice hereof furnished by the Office of Price Administration.

(b) It is also ORDERED that no person shall in any manner, directly or indirectly, during this suspension, transfer or deliver rationed commodities as defined in Ration Order No. 16 to respondent.

(c) The period of this suspension shall become effective on September 25, 1943 and shall remain in effect so long as respondent shall continue in default for any part of point indebtedness adjudged and until the respondent has given satisfactory proof to the Office of Price Administration that the said point indebtedness has been fully paid" (46-48).

** See Footnote page 13 for text of Ration Order No. 5, Article 7, Section 7.3.

period be less than twice the number served during December, 1942, the allotment is determined by dividing the number of persons served during said two month period by the number served in December, 1942, and multiplying said result by the base for food. Thus, if during December, 1942, this restaurant served 40,000 persons, and during a *subsequent two month period* it served only 20,000 persons, it would be awarded only one half of the allotment for December, and in the case at bar if petitioner be unable to use points for the procuring of food and be compelled by the suspension order to use all allotted points to pay off arrears, petitioner would be unable to secure any food with which to serve its customers. There would thus necessarily follow a complete suspension of ability on the part of petitioner to serve any customers, and if services to customers would thereby be reduced to zero, that would be the base of future allotment of points. If that figure of zero be divided by the number served in December, naturally petitioner would be awarded no points, and if it be awarded no points because business had been reduced to zero as a consequence of the suspension order, it could have no points either to carry on its business with or to pay off its indebtedness. Respondents say in effect "You may pay off your indebtedness by using points for such purpose instead of securing foods. However, if you don't secure foods you cannot serve customers, and if you don't serve customers, you cannot get points." Thus respondents place petitioner in default and keep it there, because as a result of such default it can never secure points with which to clear up such default and bail itself out. *That clearly is why counsel for respondents conceded at the argument that the effect of the suspension order would be to put petitioner out of business* (170).

The effect of the suspension order therefor would mean a destruction of petitioner's substantial business investment and its valuable leasehold. It will as a further consequence be deprived of its liquor license, for under New

York law such license is conditioned upon the sale of food (Alcoholic Beverage Control Law, Section 3, subsection 27, Section 18, subsection 7).

Since the issuance of the suspension order petitioner has not permitted any increase of its arrears but has been equitable in its conduct, keeping its use of points within its allotment (111). If petitioner had been allowed 37,476 points it would have been able to meet all of its obligations.

The District Court in denying the application stated in a memorandum opinion that there was only one question to be determined, and that was the question as to whether or not respondents had the power to issue the suspension order under review (225).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. 347(a). The mandate of the United States Circuit Court of Appeals for the Second Circuit on which review is sought was entered on May 19th, 1944.

Questions Presented.

1. Did the Congress of the United States confer upon the President of the United States the power and authority to ration foods?

2. Did Congress in conferring any authority for the rationing of foods set up proper standards for the issuance of regulations and orders?

3. Did the President of the United States have authority to delegate to the Office of Price Administration the power conferred upon him by Section (2(a)2 of Title III of the Second War Powers Act?

4. Did OPA have power under any delegation of authority to issue the suspension order herein made?

5. By issuing the suspension order in the form herein under review, have respondents abused the powers granted unto them and have they exceeded the limits of authority granted?

6. Does the power to issue regulations under Section 2(a)2 Title III (a)2 of the Second War Powers Act confer the power to issue the suspension order herein and General Ration Order 5, Article 7, Section 7.3?

7. Are such regulations, ration order, and suspension order reasonable?

8. Is not the combined effect of the suspension order and that of the provisions of General Ration Order 5, Article 7, Section 7.3 upon the petitioner unreasonable and arbitrary?

9. Is the suspension order herein penal in nature?

10. Is the effect of the suspension order herein and General Ration Order 5, Article 7, Section 7.3, separately or together, to take petitioner's property rights without due process of law?

11. Do respondents have authority to direct petitioner to post the notice set forth as Exhibit 1 (R. p. 30) as modified on appeal (R. pp. 103-105).

Reasons for Allowance of Writ.

Petitioner submits the following reasons for allowance of a Writ of Certiorari to review the order of the United States Circuit Court of Appeals for the Second Circuit:

1. The United States Circuit Court of Appeals for the Second Circuit has decided a question of substance relating to the construction and application of a statute of the United States which has not been but should be settled by this Court. This Court decided on May 22, 1944 in *L. P. Steuart & Bro. Inc. v. Bowles*, that OPA has the power under certain circumstances to issue a suspension order, and the questions determined in that case are in part similar to those herein. However that case may be distinguished from the case at bar as follows:

(a) In *Steuart v. Bowles*, the petitioner had committed wilful acts of disobedience which resulted in a suspension order. (*Steuart v. Bowles*,—F (2nd)—). In the case at bar there were no wilful acts. The suspension order herein is arbitrary and unreasonable because being suspended and unable to use points to make purchases pursuant to General Ration Order No. 5, Article 7, Section 7.3, which sets up the method for allotting points to restaurants, petitioner will be denied current allotments since they will be based upon purchases and having been prevented from making purchases it will receive no points and will be unable even to pay off its arrears in points.

(b) In the *Steuart* case Steuart was restricted to selling fuel to certain old customers instead of selling fuel to new customers. Thus its business was merely curtailed. In the case at bar petitioner has been suspended in effect from engaging in any business whatsoever for it has been precluded from securing meats, fats or oils until it has paid off its arrears in points. *The effect of this is concededly to put petitioner out of business* (R. 170). It destroys and takes petitioner's property rights without due process of law.

(c) The *Steuart* case involved rationing of fuel oil, a commodity which the ultimate consumer was authorized to receive *only upon surrendering ration points*. Thus,

when Steuart received fuel oil without points and sold it to its consumers likewise without points, there was a deprivation of some consumers to the benefit of others. Accordingly, the rationing system broke down. In the case at bar, petitioner secured meats without surrendering points, and sold them to the consumer, *who was not required to surrender points*. Consumers had the choice of dining in petitioner's restaurant or of dining elsewhere. The restriction of petitioner by means of the suspension order does not save the commodity, nor does it disturb the ultimate distribution thereof, for, the ultimate consumer can either secure the food from petitioner's restaurant or other restaurants or hotels, lawfully and properly, in accordance with his own choice. Thus, if petitioner be not suspended, the rationing system is not ultimately affected. On the other hand, if the enforcement of the suspension order herein be proper, the only effect is that the petitioner is put out of business and its valuable business and property rights destroyed; yet the consumer can secure the same commodity elsewhere. *Thus the only effect of closing petitioner's place of business is punishment of petitioner for past acts. The determination of the Steuart case does not reach this question of putting a person out of business.*

(d) In the *Steuart* case, there was no question about posting a suspension notice. In the case at bar Judge Chase indicated that he disagreed with the majority of the Court in affirming the requirement that petitioner post a notice that it had been suspended from acquiring foods.

2. The Circuit Court of Appeals for the Second Circuit has decided federal questions that probably conflict with applicable decisions of this Court.

3. The opinion of the Circuit Court of Appeals for the Second Circuit was unanimous in part but in another

part divided. Judge Chase indicated that he dissented from that part of the decision which affirmed the determination of the District Court that respondents properly directed petitioner to post the suspension notice as modified (page 30, Transcript of Record) (~~97-98~~).

93-94

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari issued to the United States Circuit Court of Appeals for the Second Circuit and submits herewith its brief in support of this petition.

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